

BEFORE THE TENNESSEE REGULATORY AUTHORITY

NASHVILLE, TENNESSEE

OCTOBER 4, 2001

IN RE:

PETITION OF THE TENNESSEE SMALL)	
LOCAL EXCHANGE COMPANY)	
COALITION FOR TEMPORARY)	DOCKET NO. 99-00613
SUSPENSION OF 47 U.S.C. §§ 251(b) and)	
251(c) PURSUANT TO 57 U.S.C. § 251(f))	
and 47 U.S.C. § 253(b))	

**INITIAL ORDER DENYING THE TENNESSEE SMALL LOCAL
EXCHANGE COMPANY COALITION'S REQUEST TO DEFER
HEARING UNTIL CONCLUSION OF DOCKET NO. 00-00523
AND ESTABLISHING A PROCEDURAL SCHEDULE**

This matter came before the Pre-Hearing Officer upon the Tennessee Small Local Exchange Company Coalition's request to defer the hearing in this matter until the conclusion of Docket No. 00-00523¹ (the "Coalition's Request"). After reviewing the Coalition's Request and Supplemental Brief, the Reply filed by Intervenors, US LEC of Tennessee, Hyperion of Tennessee, LP and the Southeastern Competitive Carriers Association, and the record in this docket, the Pre-Hearing Officer determines that the Coalition's Request should be denied and further establishes a procedural schedule to completion as set forth in this Order.

¹ Although referred to as Docket No. 00-00537 in the Coalition's Request, Docket No. 00-00523 is the TRA's docket entitled Universal Service for Rural Areas—the generic Docket (also referred to as the "Rural Universal Service Docket").

Background

On August 18, 1999, Tennessee Small Local Exchange Company Coalition (the “Coalition”)² filed a Petition with the Tennessee Regulatory Authority (the “Authority” or “TRA”) requesting a temporary suspension of the requirements of Sections 251(b)(1), (2), (4) and (5) and 251(c) of the Telecommunications Act of 1996 (the “Act”). The Petition, filed pursuant to Sections 251(f)(2) and 253(b) of the Act, seeks the suspension of the requirements of interconnection until “such time as the regulatory policies tailored to preserving universal service and maintaining affordable rates in rural service areas can be finally developed and implemented at the State and Federal levels.”³

At a regularly scheduled Authority Conference held on October 26, 1999, the Directors of the Authority voted unanimously to open a contested case in this docket and granted the petitions to intervene filed by US LEC of Tennessee, Inc. (“US LEC”), the Southeastern Competitive Carriers Association (“SECCA”), Hyperion of Tennessee, L.P. (“Hyperion”) and AT&T Communications of the South Central States, Inc. (“AT&T”) (collectively referred to as “the Intervenors”). The Directors appointed General Counsel or his designee to serve as the Pre-Hearing Officer for the purpose of establishing issues and otherwise preparing this matter for consideration by the Directors.

² The Coalition consists of the following member companies: Ardmore Telephone Company, Inc., Century Telephone Enterprises, Inc., CenturyTel of Adamsville, Inc., CenturyTel of Claiborne, Inc., CenturyTel of Ooltewah-Collegedale, Inc. Company, Loretto Telephone Company, Inc., Millington Telephone Company, Inc., TDS TELECOM companies in Tennessee consisting of Concord Telephone Exchange, Tennessee Telephone Company, Tellico Telephone Company, Humphreys County Telephone Company (collectively the “TDS local exchange carriers”), the Telephone Electronics Corp. (“TEC”) companies in Tennessee including Crockett Telephone Company, Inc., Peoples Telephone Company, Inc., West Tennessee Telephone Company, Inc. and United Telephone Company, Inc. Each member of the Coalition claims to be a rural telephone company within the meaning of 47 U.S.C. § 153 (37).

³ See *Petition*, TRA Docket No. 99-00613, p. 3 (August 18, 1999).

On December 16, 1999, a Pre-Hearing Conference was held for the purpose of establishing a list of issues and a procedural schedule. Pursuant to the initial schedule the parties conducted discovery and submitted pre-filed testimony.

On January 14, 2000, US LEC filed with the Authority notification, pursuant to 47 U.S.C. § 251(f)(1), of its “bona fide request” to TDS Telecom for an interconnection agreement with TDS and its local exchange operating companies. US LEC’s notification and the subsequent filings related thereto were filed in TRA Docket No. 00-00026.

On March 17, 2000, a Pre-Hearing Conference was held in TRA Docket No. 99-00613, during which the parties discussed the potential effect of a decision on the Coalition’s Petition in this case upon US LEC’s request for interconnection in TRA Docket No. 00-00026. The parties agreed that a decision in this docket resulting in a suspension of the requirements for interconnection set forth in Section 252 of the Act would act as a suspension of US LEC’s request. During this discussion, counsel for US LEC stated further that a determination of the Coalition’s Petition in this docket would likely determine whether or not US LEC would proceed with its request filed in TRA Docket No. 00-00026. As a result, counsel for US LEC agreed to waive the 120 day requirement set forth in Section 251(f)(1)(B) of the Act for action on US LEC’s request.⁴

During the March 17, 2000 Pre-Hearing Conference, the parties also resolved objections to discovery through the filing of a stipulation of fact. Following the completion of discovery and the filing of pre-filed testimony, hearing dates were set for August 22 and 23, 2000.⁵ The Hearing was postponed and a Pre-Hearing Conference

⁴ The Coalition has contested US LEC’s representations that the request meets the criteria for being a “bona fide request” under 47 U.S.C. § 251(f)(1). Transcript of Proceedings, March 17, 2000, pp. 39-42 (Pre-Hearing Conference).

⁵ AT&T withdrew its intervention on August 11, 2000.

was held on August 22, 2000, to permit the parties to address the impact of the Eighth Circuit Court of Appeals' decision in *Iowa Utilities Board v. FCC*⁶ on the conduct of this proceeding.⁷ Thereafter, as a result of the Eighth Circuit Court decision the parties submitted supplemental pre-filed testimony and a Status Conference was held on December 14, 2000.

During the Status Conference on December 14, 2000, counsel for the Coalition made an oral request to defer the re-setting of the Hearing in this matter until the completion of TRA Docket No. 00-00523, the Universal Service for Rural Areas – Generic Docket (the “Rural Universal Service Docket”). As grounds for the request, counsel for the Coalition stated that the resolution of certain issues in the Rural Universal Service Docket would directly affect the resolution of similar issues in this docket. Counsel for the Intervenors opposed the Coalition's request, stating that deferring this matter would cause an unnecessary delay in resolving this docket. The Pre-Hearing Officer directed the Coalition to file a written request and the Intervenors to file a response thereto for consideration by the Pre-Hearing Officer. The Pre-Hearing Officer also suggested February 14, 15 and 16, 2001 as the tentative dates for a Hearing in this docket.

On December 29, 2000, the Coalition filed *Petitioner's Request To Defer Hearing Until Conclusion Of TRA Docket No. 00-00537 and Memorandum in Support* (“Coalition's Request”). The Coalition argues that the Rural Universal Service Docket is

⁶ *Iowa Util. Bd. v. FCC*, 219 F.3d 744 (8th Cir. 2000) cert. granted in part, ____ U.S. ____, 121 S.Ct. 877, 148 L.Ed.2d 788 (2000).

⁷ In advance of the Pre-Hearing Conference, the parties filed written comments on August 18, 2001, addressing the *Iowa Util. Bd. v. FCC* opinion.

⁸ *Iowa Util. Bd. v. FCC*, 219 F.3d 744 (8th Cir. 2000) cert. granted in part, ____ U.S. ____, 121 S.Ct. 877, 148 L.Ed.2d 788 (2000).

likely to resolve a number of issues central to the resolution of this docket. The Coalition contends that its members and their subscribers will be subjected to significant harm if competition through interconnection is permitted in the absence of universal service funding mechanisms. Consistent with this reasoning, the Coalition further requests that the Authority defer US LEC's request for interconnection in TRA Docket No. 00-00026 pending resolution of the Rural Universal Service Docket.

On January 5, 2001, the Intervenors filed *Reply of US LEC of Tennessee, Hyperion of Tennessee, LP, and the Southeastern Competitive Carriers Association to Petitioner's Request to Defer Hearing Until Conclusion of Docket No. 00-00537* ("Intervenors' Reply"). The Intervenors argue that a decision to grant the Coalition's Request would be equivalent to granting the same substantive relief requested in the Coalition's Petition without requiring the Coalition to satisfy any of the federal statutory criteria necessary for suspension. US LEC also specifically objects to any further delay in its request for interconnection in TRA Docket No. 00-00026.

On January 16, 2001, the Coalition filed a Motion to File Supplemental Brief Regarding Hearing Date. In its contemporaneously filed Supplemental Brief, the Coalition renews its argument that this docket should be deferred until after the conclusion of the Rural Universal Service Docket because such resolution could render moot US LEC's request for interconnection. The Coalition denies that its procedural request will provide the relief it seeks in its Petition, arguing that the Coalition seeks a modification of certain competitive obligations until consumers served by rural local exchange carriers are protected in ways contemplated by Congress.

During the week of February 5, 2001 the proposed hearing dates were continued by agreement of the parties. On July 13, 2001, the Pre-Hearing Officer received a letter from counsel for US LEC, requesting that this matter be reset for a hearing. The Coalition filed a letter in response on August 31, 2001, reiterating its request to stay this proceeding pending the conclusion of TRA Docket No. 00-00523.

The Coalition's Request

Having reviewed and considered the Coalition's Request to defer the Hearing until the conclusion of Docket No. 00-00523, the Reply of the Intervenors and the record in this proceeding, the Pre-Hearing Officer is compelled to deny the Coalition's Request on several grounds. This docket has never been tied to the Rural Universal Service Docket and, in fact, was opened before the Rural Universal Service docket was convened. Nor does the Coalition's Petition contemplate a need to resolve the issues raised in the Rural Universal Service Docket before consideration of the relief requested in this docket. On the contrary, the Petition seeks only "a suspension of 251(b)(1), (2), (4), and (5) and 251(c) of the 1996 Act until such time as the regulatory policies tailored to preserving universal service and maintaining affordable rates in rural service areas can be finally developed and implemented at the State and Federal levels."⁹

The Coalition's contention that its members and their subscribers will be subjected to significant harm if competition through interconnection is permitted in the absence of universal service funding mechanisms is undermined by the provisions of 47 U.S.C. §251(f)(2), the section under which the Coalition professes to proceed.¹⁰ Section 251(f)(2) sets forth requirements for suspension to protect eligible local exchange carriers

⁹ See *Petition*, p. 3.

from such harm. Specifically, §251(f)(2)(A)(ii) mandates that state commissions grant petitions for suspension to the extent that, and for such duration as, such commissions find that suspensions are necessary to avoid “imposing a requirement that is unduly economically burdensome.”

During the course of the proceedings in this docket, the Coalition secured a temporary postponement of US LEC’s request for interconnection in TRA Docket No. 00-00026 when US LEC agreed to waive federal statutory deadlines and postponed consideration of Docket No. 00-00026 until completion of this docket. The agreement to postpone US LEC’s request was based on the commonality of the issues being addressed in this docket and Docket No.00-00026. US LEC did not agree, however, to waive federal statutory deadlines and postpone TRA Docket No. 00-00026 until the completion of the Rural Universal Service Docket.

For the above stated reasons, the Pre-Hearing Officer finds that the Coalition has not presented sufficient grounds to support its request and therefore, denies the Coalition’s request to defer the hearing in this matter until the conclusion of TRA Docket No. 00-00523.

The Effect of *Iowa Util. Bd. v. FCC* Decision on the Burden of Proof in this Docket

In issuing this Order, the Pre-Hearing Officer considers it necessary to comment on the burden of proof of the parties in presenting their respective positions regarding the *Petition*. The Pre-Hearing Officer has reviewed and considered the parties’ written and oral Comments regarding the effect of *Iowa Util. Bd. v. FCC*¹¹ on this docket and makes the following findings.

¹⁰ See *Petition*, p. 1.

¹¹ See *Iowa Util. Bd. v. FCC*, 219 F.3d at 760-62.

Section 251(f)(2) of the Act, which addresses “suspensions and modifications for rural carriers,” provides the framework for determining whether the evidentiary burdens are satisfied in this proceeding. Section 251(f)(2) states:

A local exchange carrier with fewer than 2 percent of the Nation’s subscriber lines installed in the aggregate nationwide may petition a State commission for a suspension or modification of the application of a requirement or requirements of subsection (b) or (c) of this section to telephone exchange service facilities specified in such petition. The State commission shall grant such petition to the extent that, and for such duration as, the State commission determines that such suspension or modification--

(A) is necessary--

(i) to avoid a significant adverse economic impact on users of telecommunications services generally;

(ii) to avoid imposing a requirement that is unduly economically burdensome; or

(iii) to avoid imposing a requirement that is technically infeasible; and

(B) is consistent with the public interest, convenience, and necessity.

Before the *Iowa Util. Bd.* case, litigants and state agencies looked to 47 C.F.R. §51.405(d) for direction on the burden of proof applicable to §251(f)(2).¹² In *Iowa Util. Bd.*, the Eighth Circuit Court of Appeals vacated Rule 51.405(d) because it unreasonably interpreted the statutory phrase “unduly economically burdensome.”¹³ The Court found that “[b]y limiting the phrase ‘unduly economically burdensome’ to exclude economic burdens ordinarily associated with competitive entry, the FCC [Federal Communication Commission] has impermissibly weakened the broad protection Congress granted to

¹² 47 C.F.R. 51.405(d) states: “In order to justify a suspension or modification under section 251(f)(2) of the Act, a LEC must offer evidence that the application of section 251(b) or section 251(c) of the Act would be likely to cause undue economic burden beyond the economic burden that is typically associated with efficient competitive entry.” (emphasis supplied).

small and rural telephone companies.”¹⁴ The Court directed agencies to look “to the whole of the economic burden, . . . not just a discrete part.”¹⁵

The *Iowa Util. Bd* decision did not alter the burden of proof for suspensions and modifications, which is implied in the language of §251(f)(2).¹⁶ The burden of justifying the Coalition’s request for suspension of §251(b)(1), (2), (4), (5) and (c) remains with each member of the Coalition, which must establish the elements listed in §251(f)(2)(A).¹⁷

Procedural Schedule and Hearing Date

To date, the parties have complied with two procedural schedules in this docket. Each party has submitted pre-filed testimony and has had the opportunity to supplement its pre-filed testimony in later filings as the need arose due to the Eighth Circuit Court of Appeals’ decision. The Pre-Hearing Officer establishes the following supplemental procedural schedule in the event the parties deem it necessary to submit additional supplemental pre-filed testimony prior to the Hearing:

October 12, 2001

Supplemental pre-filed Direct
Testimony due, if necessary.

October 19, 2001

Supplemental to pre-filed Rebuttal
Testimony due, if necessary.

All filings are required to be submitted to the Authority no later than **2:00 p.m.** on the date that they are due.

¹³ See *id.* at 760. Although the United States Supreme Court granted certiorari in *Iowa Util. Bd.*, it limited its review to issues unrelated to the portion of the opinion addressing §251(f).

¹⁴ *Id.* at 761.

¹⁵ *Id.*

¹⁶ See also 5 U.S.C. § 556(d) (“Except as otherwise provided by statute, the proponent of a rule or order has the burden of proof.”)

¹⁷ *Iowa Util. Bd* also clearly establishes that §251(f)(1) provides carriers satisfying the statutory definition of a “rural telephone company” with an preexisting exemption from the requirements of §251(c).

IT IS THEREFORE ORDERED THAT:

1. The Tennessee Small Local Exchange Company Coalition's Request To Defer Hearing Until Conclusion of Docket No. 00-00523 is denied.

2. A supplemental procedural schedule is established, as set forth herein, in the event any party deems that additional supplemental pre-filed testimony is necessary.

3. This Order is effective from the date of entry. Any party aggrieved by the decision of the Pre-Hearing Officer in this matter may file a Petition for Appeal with the Tennessee Regulatory Authority within fifteen (15) days from the date of this Order.

J. Richard Collier
J. Richard Collier
Pre-Hearing Officer

ATTEST:

KD Waddell
K. David Waddell, Executive Secretary

October 4, 2001
Date